

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2013 MSPB 40**

Docket No. CH-0752-12-0440-I-1

**Jeanene N. Mills,
Appellant,
v.
United States Postal Service,
Agency.
May 30, 2013**

Jeanene N. Mills, Columbia, South Carolina, pro se.

Lori L. Markle, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision that affirmed her removal for failure to maintain a regular work schedule. For the reasons given below, we DENY the petition for review.¹ We are issuing a precedential decision to explain how a recent court decision affects the notice of review rights that we provide to appellants in mixed cases.

¹ Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

BACKGROUND

¶2 The administrative judge affirmed the agency's decision to remove the appellant based on a charge of failure to maintain a regular work schedule, finding that the agency proved the charge, the appellant failed to prove her affirmative defense of disability discrimination, and her removal was reasonable. Initial Appeal File (IAF), Tab 12, Initial Decision (ID). In the initial decision, the administrative judge noted that the appellant failed to respond to the Affirmative Defense Order, produced no documentary evidence in support of her disability discrimination claim, and failed to appear at the prehearing conference and the close of record conference. ID at 3, 7; *see* IAF, Tab 11. The administrative judge also noted that the appellant failed to produce any additional documentation to support her appeal.² ID at 3.

¶3 The appellant filed a petition for review and attached the following evidence: (1) A notice from the Ohio unemployment compensation office granting the appellant's application for unemployment compensation benefits; and (2) an Equal Employment Opportunity Report of Investigation, with numerous exhibits, pertaining to the appellant's formal complaint of discrimination based on the agency's 2011 denial of the appellant's transfer request. Petition for Review (PFR) File, Tab 1 at 3-189. The appellant argues that this evidence, which she submitted for the first time on review, was unavailable to her before the record closed because the agency's lawyer had the appellant's only copy and she could not afford to photocopy it. *Id.* at 1.

ANALYSIS

The petition for review is denied.

¶4 Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based

² After filing her initial appeal, the appellant filed no additional evidence or argument.

on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)). After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision issued by the administrative judge, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

¶5 The appellant has not shown that the documents attached to her petition for review or the information contained in those documents were unavailable before the record closed despite her due diligence, so the Board will not consider this evidence. *See Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980) (under [5 C.F.R. § 1201.115](#) the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence). The appellant had an opportunity to obtain this evidence from the agency's lawyer by conducting discovery under the terms of the acknowledgment order, but the appellant failed to do so. IAF, Tab 2 at 3-4.

¶6 Moreover, although the appellant appears to argue that she did not receive notice of the proceedings below, we note that she is a registered e-filer, and she is deemed to have received the administrative judge's orders on the date of electronic submission, pursuant to [5 C.F.R. § 1201.14\(m\)\(2\)](#). PFR File, Tab 1 at 1; IAF, Tab 1 at 2. Further, as an e-filer, the appellant was responsible for monitoring her case activity at the Repository at e-Appeal Online to ensure that

she received all of the case-related documents. [5 C.F.R. § 1201.14\(j\)\(3\)](#). Therefore, the appellant's failure to obtain discovery is attributable to her own lack of due diligence. In sum, we find no reason to disturb the initial decision affirming the appellant's removal.

The notice of review rights set forth at the end of this decision does not include the option seeking review before the U.S. Court of Appeals for the Federal Circuit because there is no right of review before that court in a mixed case.

¶7 Where, as here, the appellant was affected by an action that is appealable to the Board and claims that the action constituted discrimination, the dispute is referred to as a “mixed case appeal.” [29 C.F.R. § 1614.302\(a\)\(2\)](#). At the Board level, a mixed case is governed by the procedures set forth at [5 U.S.C. § 7702](#). The relevant statutory provision governing judicial review in mixed cases provides that “[c]ases of discrimination subject to the provisions of [[5 U.S.C. § 7702](#) . . . shall be filed” in district court under the applicable anti-discrimination statute. [5 U.S.C. § 7703\(b\)\(2\)](#). A related statutory provision, which governs judicial review in cases not involving discrimination, provides that “a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit.” [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#). In the past, the notice of review rights included at the end of a Board decision in a mixed case has informed the appellant of the right to file a civil action in district court concerning “discrimination and other claims.” The notice has further described the alternative of filing a petition for review with the U.S. Court of Appeals for the Federal Circuit “[i]f you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims.” See, e.g., *Quinlan v. Department of Homeland Security*, [118 M.S.P.R. 362](#), 373-74 (2012).

¶8 In *Doe v. Department of Justice*, No. 2012-3204, 2013 U.S. App. LEXIS 9095 (Fed. Cir. May 3, 2013) (nonprecedential), the appellant sought review of a

Board decision in a mixed case before the Federal Circuit. Although the appellant did not seek review of the Board's conclusion that he had failed to prove his discrimination claim, the court transferred the case to district court because judicial review lay in that forum under the plain language of [5 U.S.C. § 7703\(b\)\(2\)](#). The *Doe* decision relied in large part on *Kloeckner v. Solis*, [133 S. Ct. 596](#) (2012), where the Court held that, under the plain terms of [5 U.S.C. § 7703\(b\)\(2\)](#), judicial review in a mixed case lies in district court, not the Federal Circuit, even if the Board's final decision does not decide a discrimination claim. Although *Kloeckner* did not deal with the precise question of whether an appellant has the option of seeking judicial review in a mixed case before the Federal Circuit on issues other than discrimination, *Kloeckner* clearly stands for the notion that sections 7702 and 7703(b)(2) should be read literally. Although we are not bound by the *Doe* decision because it is nonprecedential, we follow it because it is consistent with the Supreme Court's literal reading of the statutory provisions governing mixed cases in *Kloeckner*. See *Worley v. Office of Personnel Management*, [86 M.S.P.R. 237](#), ¶ 8 (2000) (the Board is not bound by a nonprecedential decision of the Federal Circuit, but it may follow such a decision if it finds the decision persuasive).

¶9 The pertinent statutory language states that a request for review in a mixed case "shall be filed" in district court. [5 U.S.C. § 7703\(b\)\(2\)](#). The statute does not state that the appellant can transform a mixed case into a nonmixed case after the Board has issued a decision simply by not seeking judicial review on a discrimination claim. As a result, from now on the Board will not inform appellants in mixed cases that they may seek judicial review before the Federal Circuit on issues other than discrimination.

ORDER

¶10 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request review of this final decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *See* Title 5 of the United States Code, section 7702(b)(1) ([5 U.S.C. § 7702](#)(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. See [5 U.S.C. § 7703](#)(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See [42 U.S.C. § 2000e-5](#)(f) and [29 U.S.C. § 794a](#).

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.